Supreme Court, U.S.
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85-545 (1)

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DONALD WYRICK,
Warden of the Missouri State Penitentiary,
BILL ARMONTROUT,
Assistant Warden of the
Missouri State Penitentiary,
LT. "GARY" WYRICK,
Petitioners,

v.

RONALD L. PARTON,
Respondent.

ON PETITION FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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30 pp

I

QUESTIONS PRESENTED

1. Whether the ruling of the United States Court of Appeals for the Eighth Circuit permitting district judges to exclude within their discretion evidence which is "conditionally relevant" under Rule 104(b) of the Federal Rules of Evidence is contrary to the language and intent of that rule.

2. Whether the conflict in circuits created by the decision of the United States Court of Appeals for the Eighth Circuit warrants the review of this issue by this Court.

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United States v. Barletta, 652 F.2d 218 (1st Cir. 1981);

Federal Rules of Evidence Rule 104;

C. Wright and K. Graham Federal Practice and Procedure § 5054 (1978).

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the court below appears at 766 F.2d 336 (8th Cir. 1985). The order of the United States District Court for the Western District of

Missouri entering the jury verdict against petitioners appears in Appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the District Court entering the jury verdict in favor of respondent under Title 42 U.S.C. § 1983, was filed on June 25, 1985. Pursuant to Title 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed within 90 days of the entry of this judgment, on or before September 23, 1985. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

1. Title 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

> the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Federal Rules of Evidence Rule 104 provides as follows:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In

making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

> (e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

STATEMENT OF THE CASE

This is an action to recover damages brought pursuant to 42 U.S.C. § 1983. Ronald L. Parton, an indigent inmate, proceeding in forma pauperis, filed a civil rights suit and named as defendants former Warden Donald Wyrick, former Associate Warden Bill Armontrout and Lt. James G. "Gary" Wyrick of the Missouri State Penitentiary and Classification Caseworker Assistants Richard Strobietto and Robert St. John of the Missouri Training Center for Men in Moberly, Missouri.

Respondent claimed that petitioners Wyrick, Armontrout and Lt. Wyrick struck and/or kicked respondent and that defendants Strobietto and St. John beat respondent unconscious with black jacks after

respondent was returned to the Missouri State Penitentiary for his role in a disturbance at the Missouri Training Center for Men in August, 1980. Petitioners and defendants emphatically denied striking respondent and maintained that respondent's alleged injuries were incurred during, or as a result of, respondent's participation in the inmate disturbance at the Missouri Training Center for Men.

This case was tried to a jury on May 8-11, 1984, with the Honorable Richard H. Ralston, United States Magistrate presiding pursuant to Title 28 U.S.C. § 636(c). In their case in chief, petitioners called Donna Mueller to the stand. Ms. Mueller, a private citizen, donated a part of her time in volunteer work with inmate programs. In this capacity she became acquainted with respondent and his ex-wife. Ms. Mueller also visited with inmates at the penitentiary. During one such visit, Ms.

Mueller overheard a conversation between respondent and his ex-wife. Ms. Mueller pinpointed the date of the conversation to be a week to two weeks after respondent had been returned to the Missouri State Penitentiary, in August, 1980. At the time, Ms. Mueller knew that respondent had been brought back from the Missouri Training Center in Moberly, Missouri for his participation in an inmate disturbance and had heard that he had filed a lawsuit alleging he had been hurt. Ms. Mueller testified, without the jury being present in an offer of proof:

> I heard him talking to his wife, asking her if she had heard from the attorney. Then--really what caught my attention was his wife's voice. It sounded like she was crying, without turning and looking at them, just the sound of her voice. It sounded like she was crying or about to cry.

> Q. What did she say?
>
> A. She said she was afraid that they would find out that Ron [respondent] was lying.
>
> Q. Did he have a response to that?
>
> A. He said, "Don't worry. They are not going to find out."

The United States Magistrate sua sponte suggested there was insufficient foundation for Ms. Mueller's testimony because it had not been conclusively demonstrated that the statements attributed to respondent specifically referred to the lawsuit at bar and ultimately sustained an objection to that effect, precluding Ms. Mueller's testimony. Petitioners in a further offer of proof offered to show that respondent had no other lawsuit drafted or filed than the instant case, at the time the conversation took place, and that a lawyer had been sought to represent respondent at that time.

The Court rejected this offer of proof. Thus, the exclusive basis for the District Court's ruling was that the petitioners were required to positively establish the connection between Ms. Mueller's testimony and this lawsuit before her testimony would be admissible.

The jury returned a verdict in favor of defendants Richard Strobietto and Robert St. John and against petitioners Donald Wyrick, Bill Armontrout and Lt. James G. "Gary" Wyrick for $15,000 in actual damages and $75,000 in punitive damages. Petitioners Wyrick, Armontrout and Lt. Wyrick timely filed their Motion for Judgment Notwithstanding the Verdict, or Alternatively for New Trial or for Remittur and then filed an appeal to the United States District Court for the Eighth Circuit when the motion was denied.

On appeal petitioners argued that the district court erred as a matter of law

excluding the testimony of petitioners' witness Donna Mueller, that respondent had stated that the attorneys were not going to find out that respondent was lying, because this testimony was conditionally relevant under Federal Rule of Evidence 104(b), and the jury could reasonably conclude from the evidence offered by petitioners that this statement referred to the lawsuit at bar. Further, the omission of Ms. Mueller's testimony was grossly prejudicial because, as admitted by the District Court, this testimony was "devastating" to respondent's case. The Court of Appeals held that "district court determinations under Rule 104 are subject to review under an abuse of discretion standard" Parton v. Wyrick, 766 F.2d 336, 337 (8th Cir. 1985), and that no abuse had occurred.

The basis for the District Court's jurisdiction to try a case alleging a violation of Title 42 U.S.C. § 1983 was

Title 28 U.S.C. § 1331 and Title 28 U.S.C. § 1343(3) and (4).

ARGUMENT

The essential issue in this petition is whether this Court should allow the courts under its supervision to, at their discretion, exclude evidence which under Rule 104(b) of the Federal Rules of Evidence is "conditionally relevant". Specifically Rule 104(b) provides that certain preliminary questions of fact with respect to the relevance of evidence are to be determined by the jury rather than the judge. This exception to the policy under Rule 104(a) of the Federal Rules of Evidence of making the judge the final arbiter on admissibility issues is for the purpose of preserving the right to a trial by jury and not just a trial by judge especially in the cases where, as in the case at bar, the fact considered as conditionally relevant coincides with an ultimate trial issue. C.

Wright and K. Graham, Federal Practice and Procedure § 5054 p. 266 (1978). The policy adopted by the United States Court of Appeals for the Eighth Circuit of reviewing the judge's exclusion of conditionally relevant evidence, which petitioners maintain is an invasion of the jury's function, utilizing an abuse of discretion standard is inherently unfair and improper.

The decision of the Eighth Circuit Court of Appeals in the present cause merits review by this Court because it is contrary to decisions of other circuits and will work grave injury to the uniform interpretation of the Federal Rules of Evidence and the interest of justice not only in the State of Missouri but in all states within the Eighth Judicial Circuit.

Because the decision by the Eighth Circuit Court of Appeals affects the uniform application of the Federal Rules of Evidence it merits review by this Court for the

purpose of settling whether the interpretation by the Eighth Circuit is the correct one or whether the interpretation of the First Circuit Court of Appeals in Bowden v. McKenna, 600 F.2d 282, 284 (1st Cir. 1979) and United States v. Barletta, 652 F.2d 218, 219 (1st Cir. 1981), the Second Circuit Court of Appeals in O'Neal v. Morgan, 637 F.2d 846, 851 (2nd Cir. 1980) and the Fifth Circuit Court of Appeals in Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1154 (5th Cir. 1981) is correct.

In the case at bar, the United States Magistrate after hearing petitioners evidence to allow the testimony of their witness stated:

> "I understand that if the jury believes the statement, that the statement relates to the lawsuit, it would have just a devastating effect on the lawsuit, in my judgment....It is unlike most situations that have minimal impact on a lawsuit."

Nonetheless, the judge excluded the witness's testimony and did not allow the jury to hear the evidence and decide whether they believed the information was relevant to the lawsuit. Because the case is nothing other than a test of credibility between petitioners and respondent, when the magistrate excluded petitioners' witness, he invaded the jury's function by assessing credibility. The Eighth Circuit reviewed the magistrate's decision only for an abuse of discretion. Typically the abuse of discretion standard is applied where the trial judge is in a better position to assess the situation at trial, however, the Eighth Circuit applied that standard to the instant case where the question is one of the application of a Federal Rule of Evidence. The Notes of the Advisory Committee on Proposed Rules of Evidence illustrate the contrary position taken by the Eighth Circuit:

> "If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries."

As the writers of Federal Practice and Procedure noted:

> "Relevance involves no technical questions that the jurors are incapable of understanding; questions of the proper inferences to be drawn from evidence are regularly submitted to the jury for their resolution in deciding the case on the merits. There is no reason to suppose that the jurors are less disposed than the judge to adhere to the requirement of relevance or that their decisions will be any less predictable than his."

Wright and Graham § 5054 at 266-267. The result the Eighth Circuit reached, allowing

the district court discretion to remove the determination of the relevance of the witness's testimony from the jury is inopposite to the intent and meaning of Rule 104(b). The holdings of the First, Second and Fifth Circuits which deny the trial courts in their jurisdiction the discretion to make a fact finding decision keeping conditionally relevant evidence from juries best implements the intent of Rule 104(b). It is important to the interests of justice to resolve the conflict in interpretation of Rule 104(b) of the Federal Rules of Evidence. Multiple interpretations by the various circuits prevents a uniform enforcement of the Federal Rules of Evidence.

The instant case presents an appropriate avenue for this Court to consider what standard is to be applied in the review of applications of Rule 104(b) because as admitted by the magistrate, the

conditionally relevant evidence, had it been admitted in the case at bar, would have been dispositive of the case. Indeed, had the same facts come before the First, Second, or Fifth Circuits, petitioners submit the evidence excluded would have been admitted.

In light of the need for this important question to be resolved it is necessary for the Court to grant certiorari in this case.

CONCLUSION

For the reasons stated herein, petitioners respectfully pray that this Court grant the instant petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 84-1852

Ronald Lee Parton,	*
	*
Appellee,	*
	*
v.	*
	*
Donald Wyrick,	*
Bill Armontrout,	*
and Lt. Gary Wyrick,	*
	*
Appellants.	*
	*
Warrant Officer Strobietto and	*
Warrant Officer St. John	*

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 12, 1985

Filed: June 25, 1985

Reported at:

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

HEANEY, Circuit Judge.

Donald Wyrick, Bill Armontrout and Gary Wyrick appeal from an adverse jury verdict in a civil rights suit brought under 42 U.S.C. § 1983 by Ronald Parton, alleging cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution. For reversal, the prison officials argue that the district court erred in excluding impeachment testimony of a government witness. After carefully reviewing the record, we affirm the judgment of the district court.

Ronald Parton, an inmate in the Missouri Penal system, was transferred to the Missouri State Penitentiary from the Missouri Training Center for Men (MTCM) because of his alleged role in a disturbance at MTCM. In this suit, Parton alleged (and the jury found) that, when he returned to the penitentiary, he was beaten by penitentiary officials. Medical records

establish that Parton was hospitalized for four days as a result of his injuries; he was knocked unconscious, suffered multiple hematomas, and complained of headaches and dizziness. The jury decided in Parton's favor and awarded $15,000 in actual damages and $75,000 in punitive damages against the three prison officials who appeal to this Court.

The prison officials argue that the district court erred in declining to admit the testimony of Donna Mueller. In an offer of proof, elicited in the jury's absence to determine the foundation for the evidence, Mueller testified that she overheard a conversation between Parton and his then-wife, in which Parton's wife allegedly said "she was afraid that they would find out that Ron was lying," to which Parton allegedly replied, "'[d]on't worry they aren't going to find out.'" (Tr. 445-46;, Offer of Proof Re: Donna Mueller's

testimony.) Although Mueller said she was within ten feet of the couple and recalled the approximate date and substance of the remarks we have set forth, she heard nothing else to link the conversation to this lawsuit. She agreed with the district court that she "really didn't know what the general conversation was about," and testified:

> To be honest with you, it was so long ago that the only thing that still sticks in my mind is her saying she was afraid they would find out that he was lying and him saying that, not to worry about it, that they wouldn't find out.

Tr. 447-48 (emphasis added).

Based on this colloquy, the district court concluded that the foundation was insufficient "to link it to this lawsuit, these claims, or any statement as made in this lawsuit."

The district court makes determinations of this sort under Fed. R. Evid. 104(b):

> When the relevency of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

We have previously decided that district court determinations under Rule 104 are subject to review under an abuse of discretion standard. United States v. Gerhart, 538 F.2d 807, 810 (8th Cir. 1976). We find no such abuse here.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

On May 11, 1985, the Honorable Richard H. Ralston, United States Magistrate after trial of the cause and the rendering of a jury verdict, ordered and adjudged the following, caption and signature omitted:

that the jury unanimously finds in favor of the plaintiff Ronald Parton and against defendant Donald Wyrick and assesses $5,000.00 actual damages and $40,000.00 punitive damages.

that the jury unanimously finds in favor of the plaintiff Ronald Parton and against the defendant Bill Armontrout and assess $5,000.00 actual damages and $20,000.00 punitive damages.

that the jury unanimously finds in favor of the plaintiff Ronald Parton and against the defendant Gary Wyrick and assesses $5,000.00 actual damages and $15,000.00 punitive damages.

that the jury unanimously finds in favor of the defendant R. Strobietto and against the plaintiff.

that the jury unanimously finds in favor of the defendant R. St. John and against the plaintiff.